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IN THE

Supreme Court of the United States

October Term, 1958.

No. 705.

KEA STEAMSHIP CORPORATION,

Petitioner,

v.

EDWARD S. MESLE

and

HAENN SHIP CEILING AND REFITTING CORPORATION,

Respondents.

BRIEF IN OPPOSITION FOR RESPONDENT HAENN SHIP CEILING AND REFITTING CORPORATION

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The main thrust of the petition for Certiorari in the present case is directed to the judgment against the petitioner and in favor of the respondent Mesle. Subsidiary to it is the petitioner's prayer that this court shall also review the action of both courts below in declining to award judgment in favor of the petitioner and against the additional respondent Haenn by way of indemnity. We direct ourselves solely to that question.

The petition (page 2) sets out the questions presented as follows:

> 1. Does the ship's warranty of seaworthiness extend to a shore workman who is injured while engaged in repairing an obviously unseaworthy condition which his employer has contracted to repair?
>
> 2. If, under such circumstances, the shipowner is liable exclusively on the theory of unseaworthiness,

is the shipowner not entitled to indemnity from the shore contractor whose substandard performance of the repair work foreseeably led to this liability?

We address only the second question because obviously if the petitioner is right on its main point, it is not liable to the respondent Mesle and the question of indemnity becomes moot. Since, however, question number 2 is pendent upon the answer to question number 1, there will necessarily be some integration of both in our discussion.

I.

IN ARGUING SUBSTANDARD PERFORMANCE ON THE PART OF HAENN, THE PETITIONER IS ASSUMING A FINDING WHICH BOTH COURTS BELOW REFUSED TO MAKE.

So much of the petition as is directed against the respondent Haenn is, and must necessarily be, based upon a finding that Haenn rendered substandard performance of its contract or failed to perform its contracted services in a workmanlike manner. The petitioner is really asking this court to make new findings on this point and to reverse the findings of both courts below with respect to it. In announcing its verdict at the close of the trial the District Court said ". . . . I have to disagree with you that there was proven negligence on the part of the foreman of the gang who represented the Haenn people. . . . Consequently, I see no way to hold the Haenn people" (166a).

The Court of Appeals reached the same result after a full review of the entire record. In its first opinion (Appendix to Petition, P21) it said "The only possibility by which indemnity might be had in the circumstances under which libellant's judgment is affirmed would require Haenn to have been the contractor who originally erected the shifting board and the shoring. There is no evidence as to the existence of such a relationship".

In its opinion on rehearings, the Circuit Court pointed out that the judgment in favor of Mesle was based upon the finding of unseaworthiness and that there was no negligence in the case on the part of either respondent and said (Appendix to Petition P22) "Since we consider it unreasonable to charge the shipowner with notice of that defect, it is implicit in the opinion that it would have been even more unreasonable to so charge the stevedore".

We think it is clear from a reading of this court's decisions in *Ryan Stevedoring Company, Inc. v. Pan-Atlantic Steamship Corporation*, 350 US 125, *Weyerhaeuser Steamship Company v. Nacirema Operating Company*, 355 US 563 and the more recent decision, *Crumady v. Joachim Hendrik Fisser*, 61 and 62, October Term, 1958, — US —, that the petitioner's right to indemnity can arise if and only if Haenn breached some contractual duty which it owed to the petitioner. Otherwise we have the concept of making the claimed indemnitee the third party beneficiary of the relational status between employer and employee and the duties which an employer may owe to his employee. In charging, as the petitioner does (Petition P10), that the respondent Haenn's foreman brought about the accident, the petitioner is arguing that indemnity should be given to it for reasons which at most can be breaches of duty which Haenn as employer may have owed to Mesle as its employee. They were not breaches of any duty which Haenn owed to Kea the shipowner.

We agree with the petitioner when it states that it is important to prevent misinterpretation of the Ryan and Weyerhaeuser cases.[1] It is equally important that these decisions not be made the basis for propositions which they do not properly support.

There are specific findings here that there was no negligence on the part of Haenn in the way in which it went about the work it undertook to perform. That amounts to a finding that Haenn rendered workmanlike

1. This applies equally to the Crumady decision which was handed down after petitioner's brief had been prepared.

service. If the petitioner is right in urging that the basic cause of the accident to Mesle was the failure of Haenn's foreman, Krushner, to direct that the work be performed in some different manner, that was nevertheless not an obligation which Haenn owed to Kea. It may have been an obligation which Haenn owed to Mesle but Haenn has never disputed Mesle's right to recover in the appropriate tribunal for any injury that Mesle sustained. In so arguing we do not concede that the work was not properly performed or directed. Both courts below have found that the injury to Mesle was due to a condition which was concealed from both the shipowner and the contractor. There was no negligence and no breach of any duty Haenn owed Kea in failing to discover the condition which the courts below have held amounted to the unseaworthiness which formed the basis for Mesle's recovery. Absent any breach of the contract for workmanlike performance and absent any substandard performance on the part of Haenn, both courts below reached the proper result on the question of indemnity. There is no conflict between the decisions cited herein and the decision in the present case, this branch of this case is not of transcending importance and there is nothing about the decision of the Court of Appeals for the Third Circuit on the indemnity feature of the case which should require review by this court.

Respectfully submitted,

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